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IN THE

Supreme Court of the United States

October Term, 1960

No. 902

MOHEGAN INTERNATIONAL CORPORATION,
Appellant,

against

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, Comptroller of the City of New York, HILDA G. SCHWARTZ, Treasurer of the City of New York and JOSEPH E. KEEGAN, Collector of the City of New York,
Appellees.

Appeal from the Court of Appeals of the State of New York

STATEMENT AS TO JURISDICTION

GERALD H. ULLMAN,
Attorney for Appellant,
Office & P. O. Address,
120 Broadway,
New York 5, N. Y.

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Opinions Below

The opinion of the New York Court of Appeals, not as yet officially reported, is reproduced in Appendix A, *infra*, p. 21. The opinion of Special Term, New York Supreme Court is reported at 17 Misc. 2d 104, 184 N. Y. S. 2d 142 (1959) and is contained in the Record on Appeal at pages 232-242. The Appellate Division, First Department affirmed, 10 A. D. 2d 841, 200 N. Y. S. 2d 359 (1960), without opinion.

Jurisdiction

This action was commenced by appellant in the Supreme Court of the State of New York, New York County, pursuant to Section 473 of the New York Civil Practice Act, for a judgment declaring that the New York City General Business Tax was unconstitutional as applied to the revenue received by appellant from exporters for offense against the Commerce Clause (Article I, Section 8, Clause 3) and the Import-Export Clause (Article I, Section 10, Clause 2) of the Constitution of the United States, and for the refund of the tax paid for the year 1956. The New York Supreme Court granted appellees' motion for a declaratory judgment holding the city tax constitutional as applied to appellant's revenue from exporters; the Appellate Division affirmed the Supreme Court; and the Court of Appeals affirmed the Appellate Division. The judgment of the Court of Appeals of the State of New York, from which this appeal is taken, was dated and entered January 12, 1961 (App. A, *infra*, p. 27) and it is final. *Dept. of Banking* v. *Pink*, 317 U. S. 264 (1942). The notice of appeal was filed in the Supreme Court of the State of New York, New York County, on March 8, 1961.

Jurisdiction of this appeal is conferred on this Court by 28 U. S. C., Section 1257(2). Cases sustaining the jurisdiction of the Court on this appeal include *Texas Transport and Terminal Co., Inc.* v. *City of New Orleans*, 264

U. S. 150 (1924); *Gwin, White & Prince, Inc.* v. *Henneford, et al.*, 305 U. S. 434 (1939); *Crew-Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917); *Joseph* v. *Carter & Weeks Co.*, 330 U. S. 422 (1947); *Freeman* v. *Hewit*, 329 U. S. 249 (1946); *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69 (1946); *Thames & Mersey Insurance Co. Ltd.* v. *U. S.*, 237 U. S. 19 (1915); *Brown* v. *Maryland*, 12 Wheat. 419 (1827); *Dahnke-Walker Mill Co.* v. *Bondurant*, 257 U. S. 282 (1921).

Statutes Drawn in Question

The General Business and Financial Tax of the City of New York is authorized by Section 24(a) of the New York State General City Law (20 Consol. Laws of New York, Section 24-a; L. 1941, Ch. 199, Section 1, as amended), the pertinent provisions of which are set out in Appendix B, *infra*, p. 29. The city tax, based upon the enabling statute, is contained in Title B, Chapter 46 of the Administrative Code of the City of New York (Local Law 44 of 1948, as amended). Section B46-2.0 of the Code provides in pertinent part:

> "SEC. B46-2.0. IMPOSITION OF TAX—a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, of or making sales within such city, for each of the periods of one year, * * * every person shall pay an excise tax * * * upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which each such period of one year shall commence * * *.

The foregoing provisions of the Code follow the enabling act, Section 24(a) of the General City Law, the validity of which is drawn in question on the ground that they violate the Commerce Clause and the Import-Export Clause of the Constitution of the United States.

Questions Presented

(1) Are appellant's services as an ocean freight forwarder in arranging for the movement of export cargo from an inland supply point across state lines to a foreign destination via an ocean carrier exclusively interstate and foreign in character, the gross revenue from which is exempt under Article 1, Sec. 8, cl. 3 of the U. S. Constitution (the "Commerce Clause") from a local tax imposed for the "privilege" of conducting business in the City of New York?

(2) Is a city gross receipts levy on the revenue from the forwarding of cargo by appellant from an inland point of origin to an overseas destination a tax on the "process of exportation" invalid under Article 1, Sec. 10, cl. 2 of the U. S. Constitution (the "Import-Export Clause")?

STATEMENT OF THE CASE

Facts

The facts are undisputed:

Appellant is an ocean freight forwarder and broker. Its principal place of business is New York City, where it employs approximately sixty people. As a forwarder and broker it renders various services required to coordinate the movement of export cargo from its interior supply point to a foreign destination aboard ocean carriers. Forwarders such as appellant are used by almost all exporters, most of whom are located at inland points beyond the port area.

At the outset appellant renders advice to its customer, usually the American exporter but occasionally the overseas purchaser, as to import and export licenses, letters of credit and the best port of exit for the particular shipment. It also advises as to the method of shipment to seaboard (rail or truck) and instructs the exporter as to the time when the goods are to move from the exporter's plant.

Appellant selects the vessel and arranges for space (booking the cargo) and as the consignee of the goods at the port it coordinates the movement to seaboard by following the shipment in its rail cars from carrier to carrier (tracing) and by checking with the carrier to see that cars "in bad order" (needing repairs) are put back in movement (expediting). To avoid delays in the loading aboard ship and to prevent the cargo from not being loaded (shut-out), appellant issues a specific order to the rail carrier, the Delivery Instructions (Def. Ex. D, R. 213), as to the precise time the shipment is to be lightered from the New Jersey rail terminal to shipside. Appellant makes certain that the goods arrive at the pier or shipside when needed and are loaded on board the ship.

Appellant prepares and processes necessary shipping documents. After it assures itself that the cargo is in the hold of the ship, a duty it owes to its shipper even though it does not physically handle the goods, appellant tenders the "on-board" bill of lading to the carrier for signature. It prepares and clears through the Custom House the Export Declaration (Def. Ex. F, R. 217) required by federal law for the exportation and processes through the appropriate foreign consul, when needed, a Consular Invoice (Def. Ex. G, R. 219), thus obtaining the clearance of the importing country for the shipment.

Appellant arranges for others to provide various accessorial services that may be required on the shipment, such as warehousing, cartage and marine insurance.[1] From time to time it consolidates for either the exporter or consignee on one bill of lading sundry shipments coming from different interior manufacturers, thereby effecting considerable economies.

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[1] Appellant is *not* a local insurance broker, as stated by the Court of Appeals (App. A, *infra*, p. 24). It arranges for such insurance through an insurance broker and charges the exporter a service fee to cover costs. The laws of New York permit appellant to perform this function without the necessity of being licensed as an insurance broker (N. Y. Insurance Law, Sec. 128).

Most of the shipments dispatched by appellant are prepaid, requiring it to present to the New York bank holding the letter of credit an "on board" bill of lading. Before it can do so, appellant must make certain that the shipment has actually been loaded on the ship and if there is a delay, it exerts pressure upon the steamship line to get the shipment on board. Failure to meet the ship may lose the sale. Thereafter, appellant furnishes the bank a complete set of shipping documents after which payment is made by the bank to the exporter under the letter of credit. Included in the payment is appellant's charge to the exporter.

For the various services it renders to get the shipment dispatched, appellant is compensated by both the shipper and ocean carrier on each shipment. From the shipper it receives a forwarding fee ranging from $10 to $20 per shipment and a small service fee to cover costs in arranging for accessorial services. It is the taxability of this gross revenue from the shipper that is in issue herein. Appellant receives also a commission of 1¼ to 2½% of the freight charge from the carrier, which appellees and the courts below have conceded is exempt from the city tax and is not in issue in this case.

The Questions Presented Were Ruled Upon Below

All of the questions presented were raised in the pleadings [2] and briefs and argued in the courts below. The New York Supreme Court sustained the validity of the statute and City Code and its judgment was affirmed by both the Appellate Division and the Court of Appeals. The Court of Appeals expressly ruled in its opinion on all the constitutional questions raised.

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[2] R. 17-27.

THE QUESTIONS PRESENTED ARE FEDERAL AND SUBSTANTIAL

POINT I

Appellant as an ocean freight forwarder is engaged exclusively in interstate and foreign commerce and is thereby exempt from the city privilege tax under the Commerce Clause.

Article 1, Section 8, Clause 3 of the U. S. Constitution, the "Commerce Clause", provides in pertinent part as follows:

> "The Congress shall have Power * * * to regulate Commerce with foreign Nations, and among the several States * * *."

It is fundamental that under the Commerce Clause neither a state nor a subdivision thereof may impose a tax for the *privilege* of conducting a business exclusively in interstate or foreign commerce. *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 458 (1959); *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359 (1954).

The precise issue herein is whether the business of the appellant as an ocean freight forwarder is exclusively in interstate or foreign commerce. The test, according to the Court of Appeals, is "whether plaintiff's local New York activity is such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. (*Berkshire Fine Spinning Associates, Inc.* v. *City of New York, et al.*, 5 N. Y. 2d 347, 354, appeal dismissed 361 U. S. 3)." (App. A. *infra*, p. 24) This is the same test promulgated by this Court in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 166 (1954). The Court of Appeals held that appellant's business as a forwarder did not meet the test on the ground that it was "local" and "separate" from the interstate process (App. A, *infra*, p. 25).

Appellant urges that the Court of Appeals has erred. The undisputed facts establish beyond any doubt that the forwarding function of appellant is an integral part of the interstate process, the flow of commerce, and cannot realistically be separated from it. In determining the port, coordinating the movement to shipside, tracing and expediting lost or delayed cargo, booking the shipment and preparing and processing necessary shipping papers, appellant is exercising so close a dominion and control over the movement of the goods that it cannot be said that its activities are "separate" from the flow commerce. Indeed, its activities are a *sine qua non* for the flow of the cargo. Until the appellant as a forwarder enters the picture, the goods destined for export lie dormant at the manufacturer's plant. The forwarder acts as the catalytic agent breathing life into the process of exportation, thus making it possible for the traffic to move across state lines into our foreign commerce. Goods sold for export must be forwarded and the simple fact is that *there would be no exportation* unless appellant and others like it rendered this service.

The view taken by the Court of Appeals that the appellant's services "constitute a local business and are separate and apart from [foreign] commerce" is not only patently at variance with the conceded facts but also in conflict with the pronouncements of every federal agency that has inquired into the role of the ocean freight forwarder. *In U. S.* v. *American Union Transport, Inc. et al.*, 327 U. S. 437 (1946), this Court noted "[t]he intimate relationship of the forwarder to both shipper and carrier, essentially that of go-between * * * *" (p. 450). In that case it held that ocean freight forwarders were "carrying on the business of forwarding * * * in connection with a common carrier by water" and were, therefore, "other persons" as defined in the U. S. Shipping Act, 1916, as amended (46 U. S. C. § 801, *et seq.*) subject to federal regulation. One of the reasons for its holding, the Court noted, was that the activities of forwarders are "*intimately*

connected" with the receiving, handling, storing or delivery of property in foreign commerce under Section 17 of the statute (*Id.* at p. 449).

The House Merchant Marine and Fisheries Committee has concluded that "the work of freight forwarding is essential to the movement of goods in foreign commerce under normal conditions."[3] The U. S. Maritime Commission, after a lengthy investigation, described the forwarder as "an indispensable link between * * * shippers and carriers."[4] A federal review court has held that "forwarding activities have developed American commerce" and that forwarders are "an integral part of the commerce of the United States."[5] The trial court in this case has found that the forwarding activities of appellant "were vitally important to foreign and interstate commerce" (17 Misc. 2d 104, 109; 184 N. Y. S. 2d 142, 147).

It is inconceivable that appellant as a forwarder can be an "essential", "integral", "vital" and "indispensable" part of the movement of cargo in our foreign commerce and yet be considered, as it was by the court below, "separate from such commerce."

The forwarder is paid by both the exporter and the ocean carrier for the various services rendered in arranging for the exportation of the shipment. The office of the Comptroller, City of New York has acknowledged that appellant's revenue from the carrier is immune from the city levy because the forwarder's activities as a broker "are an integral part of foreign commerce" (Pl. Ex. 2, R. 206). The trial court agreed that appellant was "entitled" to this immunity but was unable to distinguish

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[3] H. Rep. 1681, 77th Cong., 2d Sess., p. 5.

[4] *Agreements and Practices Pertaining to Brokerage, etc.*, 3 U. S. M. C. 170, 174 (1949).

[5] *Atlantic and Gulf/West Coast of Central America and Mexico Conferences* v. *U. S.*, 94 Fed. Supp. 138, 141 (1950); see also *Pacific Westbound Conference* v. *U. S.*, 94 Fed. Supp. 649 (1950).

between the services rendered by appellant to carriers as a broker and those furnished to exporters as a forwarder. Indeed it found an overlapping and duplication of such services (17 Misc. 2d 104, 111; 184 N. Y. S. 2d 142, 149).[6] May it logically be said that appellant's gross revenue from exporters should be subject to the city levy and yet its receipts from ocean carriers be exempt, when the services rendered by appellant are the same to both parties, by the same personnel, on the same shipment and moving on the same vessel? The answer in the affirmative by the Court of Appeals would seem provincial. Forwarding services to the exporter and brokerage services to the steamer are inextricably interwoven and it cannot realistically be said that the former are "local" and the latter "in foreign commerce".

As the result of the decision by this Court in the *American Union Transport* case, *supra*, forwarders have been subject to direct and detailed regulation by the Federal Maritime Board. Under the authority of the U. S. Shipping Act, 1916, as amended (46 U. S. C. § 801) and the Merchant Marine Act, 1936 (46 U. S. C. § 1114) the Board has adopted General Order 72 (Pl. Ex. 5, R. 207) regulating forwarding activities in the same detail as the Board's regulation of ocean carriers under these statutes. The regulatory scheme is also similar to that exercised by the Interstate Commerce Commission over rail and motor carriers and domestic forwarders. All of these businesses have been held exempt from a local privilege tax.[7]

If the foregoing businesses are engaged in interstate and foreign commerce, then it may not reasonably be said

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[6] This Court similarly noted the duality of services to shipper and carrier in the *American Union Transport* case, *supra*, p. 442 fn. 6.

[7] Ocean carriers: *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326 (1887); rail carriers: *Fargo* v. *Michigan*, 121 U. S. 230 (1886); motor carriers: *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951); domestic forwarders: conceded exempt by the city (Pl. Ex. 2, R. 206).

that appellant, subject to identical federal control and working closely with these enterprises in the overseas dispatch of the goods, is in a "local" business. Moreover, this position of the Court of Appeals is in basic conflict with the assumption of jurisdiction over the activities of forwarders by the federal government under the U. S. Shipping Act. Section 33 dictates that the act shall not be "construed to apply to *intrastate* commerce" (46 U. S. C. § 832). If the business of forwarding is local, *i.e.*, intrastate, as the Court of Appeals held, then based upon the interdict of Section 33 the exercise of authority over forwarders by the Maritime Board under the Shipping Act is unlawful. On the other hand, if the business is interstate and foreign in nature properly subject to federal regulation, then the Court of Appeals has erred in holding forwarding to be a local or intrastate activity subject to the city tax. A resolution by this Court of this conflict in the forwarder's status is most desirable.

Unless the decision of the Court of Appeals is reversed, it would mean that the movement of goods in our interstate and foreign commerce can be effectively taxed out of existence by a state or subdivision thereof. American exporters would by local levies on the essential function of forwarding be placed at a disadvantage to their foreign competitors at variance with the constitutional purpose of conferring upon Congress alone the power to regulate commerce between the states and with foreign countries. *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414, 429 (1940). It would also mean that a port city, such as New York, may obtain a larger proportion of necessary revenue from the flow of commerce by taxing the gross revenue of forwarders. A primary reason for the adoption of the Commerce Clause was to avoid such a local toll on the passage of commerce through a locality, even though levied without discrimination. *Joseph* v. *Carter & Weeks Co.*, 330 U. S. 422, 433 (1947).

In upholding the tax herein, the Court of Appeals failed to recognize decisions of this Court conferring immunity from a local privilege tax upon persons directly involved in the movement of goods in interstate and foreign commerce. An exporter is exempt from a state gross receipts tax under the Commerce Clause on the ground that he is engaged in interstate and foreign commerce. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917). The "indispensable" agent of the exporter who makes it possible for the exportation to take place is no less in such commerce and should receive the same tax immunity.

A steamship agent representing an ocean carrier which does not maintain its own office at the port is exempt from a local privilege tax. *Texas Transport & Terminal Co., Inc.* v. *City of New Orleans*, 264 U. S. 150 (1924). Such an agent, like the forwarder, does not physically handle the goods or assume transportation responsibility. It performs its services within the city limits on behalf of its absentee principal, just as in the case of a forwarder. The record herein shows that the steamship agent and the forwarder work closely together in the booking of the cargo, the coordination of the movement to shipside and in the preparation and processing of shipping documents (R. 175, fols. 524-525). If the carrier's agent at the port is exempt from a privilege tax, there is no cogent reason why the exporter's port agent should not receive a similar immunity. The services of each are essential to its respective principal and the tax treatment of these agents should be identical.

In *Gwin, White & Prince, Inc.* v. *Henneford, et al.*, 305 U. S. 434 (1939) this Court held that a marketing agent for fruit growers was exempt from a Washington gross receipts tax on the business done from that state on the ground that "the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in [interstate or foreign] commerce" (Id. at p. 437).

One of the primary services performed by the taxpayer in the *Gwin* case was "to attend to all traffic matters pertaining to shipment and transportation of the fruit" (Id. at p. 436). We see no basic difference in the essentiality of the services of the marketing agent and the forwarding agent. In both cases agents of the shipper are performing entirely within the taxing state a non-physical service required in the transportation of goods in interstate and foreign commerce. Assuredly, the forwarder's "vital" and "indispensable" services are no less important to the dispatch of the goods than those of the taxpayer in the *Gwin* case. The gross revenue of the forwarder should, therefore, be granted the same constitutional protection.

The Court of Appeals failed to treat any of the cases cited above by appellant in its brief in that court. Instead, it relied entirely on the decisions of this Court in *Canton Railroad Co. v. Rogan*, 340 U. S. 511 (1951), and *Western Maryland Railway Co. v. Rogan*, 340 U. S. 520 (1951), both decided on the same day, to deny immunity under the Commerce Clause. *There is not a single reference to this clause in either case.* On the contrary, each decision with particularity confines the issue to taxability under the Import-Export Clause (340 U. S. at p. 512 and 340 U. S. at p. 520) despite a belated attempt by the taxpayer in the *Canton* case to raise a constitutional question under the Commerce Clause in its brief in this Court. The Court of Appeals was in error, therefore, in citing these cases as authority to sustain the tax herein under the Commerce Clause.

But even if the court below was correct in this regard, the *Canton* case was misinterpreted. There was no question before this Court in that case as to whether the services rendered by the railroad therein were "local" or "interstate" under the Commerce Clause. Concededly, the railroading therein was an "interstate enterprise" (Id. at p. 515). Despite this fact, this Court in the *Canton* case was merely reiterating its long settled rule that a non-discriminatory gross receipts tax on a railroad, if fairly

apportioned to the business done within the taxing state, was valid. In the instant case, however, the proper apportionment of the tax is not involved, as the trial court found (17 Misc. 2d 104, 111; 184 NYS 2d 142, 149). The sole question is whether the forwarding services are local or in interstate and foreign commerce. The *Canton* case sheds no light whatsoever on this issue under the Commerce Clause.

Based upon the essential role that the forwarder plays in our foreign commerce, the detailed and direct regulation of its activities by the Federal government and the decisions of this Court in comparable factual situations it must be concluded that the Court of Appeals erred in holding that the appellant as a forwarder was engaged in a "local" business. Plenary consideration by this Court would be justified not only for these reasons, but also to prevent a serious inroad by the City of New York upon the constitutional safeguard against privilege taxes on the interstate and foreign process.

POINT II

The forwarding function of appellant is an integral part of the process of exportation which may not constitutionally be taxed by the City of New York under the Import-Export Clause.

Article 1, Section 10, Clause 1 of the U. S. Constitution (the Import-Export Clause) provides in part as follows:

> "No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports * * *."

This Court has consistently held that the constitutional prohibition against a state impost on exports goes beyond a direct tax laid upon the goods themselves. The immunity extends to "the process of exportation and to the transac-

tions and documents embraced in that process * * *. Only on that construction can the constitutional safeguard be maintained." *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 81-81 (1946). Under this doctrine essential shipping documents have been held exempt from state and federal taxes. *Fairbanks* v. *U. S.*, 181 U. S. 283 (1901); *U. S.* v. *Hvoslef*, 237 U. S. 1 (1915); *Selliger* v. *Kentucky*, 213 U. S. 200 (1909). Immunity from a stamp tax was likewise granted to marine insurance policies on the ground that they were "an integral part of the exportation". *Thames & Mersey Insurance Co. Ltd.* v. *U. S.*, 237 U. S. 19, 26 (1915).

Forwarding activities must be granted a similar exemption if the constitutional protection of the Import-Export Clause is to remain meaningful. It cannot be said that a bill of lading or a marine insurance policy is more important to the process of exportation than the forwarding function, which, as previously noted, has been described as "essential", "indispensable" and "an integral part of the commerce of the United States."[8] An exporter may ship his goods without insuring them, although he would be imprudent to do so, but he cannot eliminate the forwarding function. It must take place on every shipment.

Sustaining the tax herein would run counter to the detailed precautions taken by our founding fathers in the Constitution to prevent obstructions to the flow of exports. They made it clear that the process of exportation should not in any way be restricted by either a federal or state tax. Thus, to prevent discriminatory action at the federal level it was provided that no preference could be given to the ports of one state over another (Art. 1, Sec. 9, Cl. 6); that all federal taxes must be uniform (Art. 1, Sec. 8, Cl. 1); and that there could be no federal tax on exports

[8] See footnotes 3, 4 and 5, p. 9, *supra*.

(Art. 1, Sec. 9, Cl. 5). In order to prevent any state from exercising a taxing power that the federal government was denied with respect to exports, it was also provided that no state could tax exports (Art. 1, Sec. 10, Cl. 2).

The evident policy of the Constitution was to avoid imposing upon inland producers the burden of paying tribute to seaboard cities for the privilege of exportation and thus maintain free and equal access to foreign ports for interior areas. If the constitutional policy can be avoided by shifting the tax from the exported article itself to some essential activity in the exportation, such as forwarding, then the policy is a practical nullity.[9]

This Court has held that the gross revenue of an exporter is exempt from a state tax under the Import-Export Clause. *Crew Levick Co.* v. *Pennsylvania, supra.* This revenue may include a fee from its customer, the overseas consignee, for forwarding services where the exporter does its own forwarding. If this revenue from forwarding by the exporter is exempt, as the city acknowledges in its regulations,[10] then the identical revenue should not be taxed when it is received by the forwarder for the same function. It is neither good sense nor good law for receipts for similar services to have a dual status under the city tax laws. Yet, this is precisely the situation in the City of New York if the Court of Appeals decision herein is not reversed.

In denying immunity under the Import-Export Clause to the appellant, the court below relied again upon the decisions of this Court in the *Canton and Western Maryland* cases, *supra.* The *Canton* case involved switching,

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[9] See the remarks of Mr. Justice Jackson in reserving decision in *Canton and Western Maryland, supra,* at pp. 515-517; see also 50 Michigan Law Review 152, 153 (1951).

[10] Regulations, General Business and Financial Tax, Office of the Comptroller, City of New York March, 1957 reprint edition, pp. 42-43.

storage, wharfage and weighing activities by a railroad within the City of Baltimore. In *Western Maryland* the tax was on the rail transportation within the state of cargo moving in export or import. This Court held in these cases that the export and import process began and ended "at the water's edge" and that "the handling of the goods at the port" by the taxpayers therein would not, therefore, be part of that process (Id. at p. 515). In the case *sub judice* the Court of Appeals apparently sustained the tax on the theory that the forwarding activities were comparable to the handling of the goods at the port and were, consequently, in the same category as the railroad operations held taxable in *Canton* and *Western Maryland* (App. A, *infra*, p. 25).

This was clearly error. In its own summary of the activities performed by the appellant the Court of Appeals noted that the forwarder "*never handles these goods at all*" (App. A, *infra*, p. 22, emphasis supplied). This is in accord with the finding of the trial court to the same effect (17 Misc. 2d 104, 105-106; 184 N. Y. S. 2, 142, 144). Rather, the forwarder coordinates and arranges for the movement of cargo from an inland supply point to a foreign destination. Manifestly, the Court of Appeals has improperly applied the decisions in the *Canton* and *Western Maryland* cases. This Court was dealing therein with the question of immunity from a state tax of those who had a *physical connection* with the movement of the goods *within* the state. This is precisely what the Court meant by the use of the word "handling". The cases did *not* determine the question as to whether essential forwarding services of a non-physical nature extending across state lines were part of "the process of exportation". Whether such service should be given the constitutional protection of the Import-Export Clause would appear to be one of first impression meriting review by this Court.

It is most doubtful that this Court intended the water's edge test to apply in the circumstances of this case. When do a forwarder's services begin and end? Obviously, in dealing with a necessary non-physical service in the transportation of goods the precise terminal points are not readily ascertainable. For example, the forwarder prepares and places into the export process the bill of lading on each shipment. When it arranges for this document to be received by the carrier and overseas consignee, *inter alia*, do not its services extend beyond "the water's edge?" Only by a review of the within case may it be determined with finality whether the *Canton* and *Western Maryland* cases were intended to apply to non-handling services necessary to the exportation extending across state lines into our foreign commerce.

Even if it be assumed, *arguendo*, that the water's edge test could properly be applied in this case, the record herein establishes that the appellant complies with such standard. It does more than merely "wait" until the goods are loaded on board the ship before it tenders the letter of credit to the bank, as the Court of Appeals states in its opinion (App. A, *infra*, p. 25). The undisputed testimony is that appellant owes a clearly defined duty to the exporter to be "sure" that the goods have been placed in the hold of the ship (R. 64, fols. 190-192). It fulfills this duty by checking with the steamship pier and when necessary, by exerting pressure with the steamship office "to get shipments loaded" (R. 123, fols. 368-369). This is its overall responsibility and undertaking with the shipper (R. 124, fol. 372). Thus, even though the forwarder is not responsible for the actual loading of the goods, it *is* responsible and must exercise reasonable care to see to it that the goods, properly documented, are loaded upon the designated ship. Negligence by the forwarder in the exercise of this responsibility can result in liability. *Princess Pat, Ltd., etc.* v. *National Carloading Corp., etc.*, 223 F. 2d 916 (1955).

It is apparent, therefore, that the forwarder's services do in fact extend beyond the water's edge until the goods are actually on board ship. Indeed, on many shipments it issues instructions (Def. Ex. D, R. 212) to the railroad to lighter the goods from the New Jersey side of the Hudson River directly to the ship at its berth on the New York side. The goods never reach the pier. This function of controlling and coordinating the movement of the goods by the rail carrier directly to the vessel likewise illustrates that appellant's services extend beyond the water's edge. Thus, the test has been met.

CONCLUSION

Appellant respectfully submits that the decision below is erroneous, in conflict with the decisions of this Court and the exercise of jurisdiction over appellant by the Federal government and is one of first impression; and that the Federal questions presented are substantial and merit plenary consideration and redress by this Court.

Respectfully submitted,

GERALD H. ULLMAN,
Attorney for Appellant,
Office & P. O. Address,
120 Broadway,
New York 5, N. Y.

April, 1961.

APPENDIX A

1. Opinion of the Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

No. 341

MOHEGAN INTERNATIONAL CORPORATION,

Appellant,

vs.

THE CITY OF NEW YORK, & ors., &c.,

Respondents.

DESMOND, Ch. J.:

The appeal by plaintiff, on constitutional grounds, is from a unanimous Appellate Division, First Department, affirmance of a summary judgment which dismissed the complaint and declared the New York City General Business and Financial Tax constitutional as applied to plaintiff's receipts for services in New York City as a "freight forwarder", and denied recovery of taxes paid by plaintiff thereon for the year 1956. Plaintiff brought the action to have it declared that the tax (Administrative Code of City of New York, § 46-2.0) is unconstitutional as to plaintiff's business receipts since, according to plaintiff, it is a tax for the privilege of conducting a business which is interstate and foreign, and an impost on exports (U. S. Const., art. I, § 8, cl. 3; art. I, § 10, cl. 2).

The facts are undisputed. All the receipts taxed are produced by plaintiff's New York City activities. All the taxed activities are performed at the instance of and on

behalf of either domestic exporters or foreign importers and, described most generally, involve services of appellant at New York City in coordinating and expediting the movement from inland points to ocean carriers of American-produced goods which are carried by ship to foreign ports.

It is important to keep in mind that the city is not taxing those receipts of plaintiff which are paid by the ocean carriers—that is, the brokerage fees from the carriers for booking the cargoes and for incidental services for acting as a "foreign freight broker". The receipts which are taxed by the city and which plaintiff claims cannot constitutionally be taxed are performed for and paid for by the exporter (or foreign importer) who is moving goods from an inland point to a seabboard point. They are, in other words, services as a "foreign freight forwarder". The taxed services are described generally by appellant as those of "an ocean freight forwarder in arranging for the movement of export cargo from an inland supply point across state lines to a foreign destination" and "forwarding of cargo by appellant from an inland point of origin to an overseas destination * * *." A little overstatement is involved there since appellant, while it books space on the ships and collects and is not taxed on its fee for so doing, never handles these goods at all and has no warehousing, stevedoring or other cargo-handling facilities or functions but performs, for the shipper at New York City incidental services in helping the shipper get his goods to the right New York City pier at the right time. Appellant, of course, is not itself a shipper or exporter or common carrier, has no ownership of or other interest in the goods and never has actual or constructive possession of the goods or responsibility for them. It receives for its "forwarding" services not a commission but a fee based on the time appellant's

employees devote to each shipment. Its annual income (1956) for the forwarding part of its business was about $244,000. Most of its customers are American exporters. A few are overseas consignees.

The details of plaintiff's operations as a forwarder are set out in the record. As a first step, appellant obtains from the exporter and checks the foreign import license and letter of credit. It advises the exporter as to what port to select for shipment and as to method and time of shipment to that point, then makes a space reservation on a particular vessel after checking its facilities and sailing and destination time. On their movement to seaboard the goods are consigned to appellant and appellant, if necessary, checks on their progress so that they will arrive on time. But appellant does not control or direct the railroad's operations. It merely obtains information as to where the goods are from time to time. Carload lots usually reach seabboard by railroad and are lightered from New Jersey to a pier or to the ship. Smaller shipments come by motor trucks which carry them directly to the pier. Careful timing of arrival at the pier or ship is necessary so that the ship will not be delayed in sailing or the goods left behind. When necessary appellant arranges for delivery to the pier or steamer and prepares a dock receipt which the ship's master signs and which the ocean carrier uses as the basis for its bill of lading when later issued. Appellant prepares that bill of lading, putting the goods into the correct tariff classifications and gets the bill of lading signed at the steamship company's New York City office. Appellant advances the ocean freight money. It prepares and files at the United States Customs Office the export declaration required by Federal law and arranges for insurance on the goods. Also, it performs other incidental services of the same kind and makes separate charges for some of

them and for the printed forms it furnishes. There is in appellant's brief a sort of suggestion that appellant supervises or checks the loading of the goods onto the ship. However, the complaint does not so allege, there is no proof thereof and the affirmed finding is to the contrary. Appellant's functions as forwarder, therefore, consist of "tracing" the shipment from inland to seaboard so that it will arrive on the pier on time, preparing a number of documents, getting them signed and filed with the Customs House or banks, and obtaining insurance, as agent of the shipper. Appellant, however, is not itself an insurer but a local insurance broker.

We agree with Special Term that all these forwarding activities were local. The cases principally relied on in the Special Term opinion are *Canton R. R. Co.* v. *Rogan* and *Western Maryland R. R. Co.* v. *Rogan*, both reported in 340 United States (pp. 511, 520) and both dealing with the same Maryland State tax. Canton was a railroad company which, operating entirely within the city of Baltimore, performed switching, storage, crane and wharfage services as to goods about to be shipped abroad. The Western Maryland Company operated piers in Baltimore and at those piers and at a grain elevator handled and stored goods about to be exported. Respondent says appellant's services are essentially of the same kind as those held by the Supreme Court (in *Canton* and *Western Maryland*) to be subject to local taxation.

Much of appellant's brief is taken up by an elaborate showing of the importance and value of appellant's services, which seems beside the point. The test is whether plaintiff's local New York City activity is "such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it" (*Berkshire Spinning Assoc.* v. *City of N. Y.*, 5 N. Y. 2d 347, 354, appeal dismissed 361 U. S. 3). Plaintiff has been exempted from

the tax as to its income derived from acting as agent for the ocean carriers. The tax here is on its local services performed for non-carriers not including any actual transportation services or any responsibility for such service (see discussion as to appellant itself and other forwarders in *United States* v. *American Union Transport, Inc.*, 327 U. S. 437). Appellant's services are of course connected with and important to foreign commerce but they constitute a local business and are separate from such commerce.

As to this tax violating the Import-Export clause of the Federal Constitution (as distinguished from the Commerce clause), the law is that even the handling at the port of goods about to be exported are taxable local activities since the export processes "begin and end at the water's edge" and "any activity more remote than that does not commence the movement of the commodities abroad nor end their arrival and therefore is not a part of the export or import process" (*Canton R. R. Co.* v. *Rogan*, 340 U. S. 511, 515, *supra*—see, also, *Western Maryland R. R. Co.* v. *Rogan*, 340 U. S. 520, 522, *supra*). Appellant is not responsible for loading of the goods and does not have its representative there although it must wait until they are loaded before it can tender the letter of credit to the bank.

The judgment appealed from should be affirmed, with costs.

Judgment affirmed, with costs. Opinion by Desmond, Ch. J. All concur.

2. Judgment of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 12th day of January in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur January 12, 1961.

2. Judgment of the Court of Appeals

No. 341

Mohegan International Corporation,
Appellant,

vs.

The City of New York, & ors., &c.,
Respondents.

Be it remembered, That on the 14th day of October in the year of our Lord one thousand nine hundred and sixty, Mohegan International Corporation, the appellant—in this cause, came here unto the Court of Appeals, by Gerald H. Ullman, its attorney—and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The City of New York, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Charles H. Tenney, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Gerald H. Ullman, of counsel for the appellant—and by Morris L. Heath, of counsel for the respondent—and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted

to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office,
Albany, January 12, 1961.

I HEREBY CERTIFY that the preceding record contains a correct transcript of the proceeding in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON,
(Seal) Clerk.

APPENDIX B

Statutes and Regulations Involved

GENERAL CITY LAW, ARTICLE 2-B—GENERAL BUSINESS AND FINANCIAL TAX AUTHORIZATION

"§ 24-a. * * *

"* * * any city having a population of one million or more, acting through its local legislative body, shall have power to adopt and amend local laws imposing in any such city a tax upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity, other than a financial business or making sales within such city, measured by the gross receipts from such activities carried on or sales made within the city, * * *. Every such local law in the terms shall be, substantially, as follows:

* * * * *

"§ 2. **Imposition of tax. a. For the privilege of** carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales within such city, during each year, * * * every person shall pay an excise tax * * * upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during each calendar year * * *."

(Section 24(a), N. Y. State General City Law.)

FILE COPY

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FILED
MAY 10 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 902

MOHEGAN INTERNATIONAL CORPORATION,

Appellant,

against

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, Comptroller of the City of New York, HILDA G. SCHWARTZ, Treasurer of the City of New York and JOSEPH E. KEEGAN, Collector of the City of New York,

Appellees.

MOTION TO DISMISS APPEAL

LEO A. LARKIN,
STANLEY BUCHSBAUM,
Counsel for Appellees.

MORRIS L. HEATH,
of Counsel.

May 5, 1961

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Appellees.

MOTION TO DISMISS APPEAL

Preliminary Statement

The appellant has appealed from a final judgment of the Court of Appeals of the State of New York dated January 12, 1961, unanimously affirming a judgment of the Appellate Division of the Supreme Court of that State, which court had unanimously affirmed, without opinion, a judgment of the Supreme Court of that State.

The opinion of the Court of Appeals is officially reported in 9 NY 2d 69 and is set forth in Appendix A of the appellant's jurisdictional statement. The decision of the Appel-

late Division is officially reported in 10 AD 2d 841 and the opinion of the Supreme Court in 17 Misc 2d 104.

By this appeal, the appellant challenges the constitutional validity of the New York City General Business and Financial Tax as imposed on it for the privilege of carrying on business within the City to the extent that the tax is measured by its gross receipts from business as a foreign freight forwarder. It contends that the tax, to the extent that it is measured by such receipts, is repugnant to the Commerce Clause and the Import-Export Clause.

Appellees move to dismiss the appeal on the ground that it does not present a substantial federal question.

Statutes Involved

The statute authorizing the City of New York to impose the tax is referred to in Appendix B of the appellant's jurisdictional statement. The local law of the City of New York imposing the tax is Title B of Chapter 46 of the Administrative Code of the City of New York.

Statement of the Case

This is an action brought by the appellant for a declaratory judgment holding its receipts as a foreign freight forwarder not subject to tax by virtue of the Commerce Clause and Import-Export Clause of the Federal Constitution and to recover the tax paid for the year 1956. After issue was joined an examination before trial of appellant was held. Both sides then moved for summary judgment.

The trial court granted appellees' motion and denied appellant's motion, and entered judgment declaring the tax constitutional as applied to appellant's receipts as a foreign freight forwarder and denying appellant recovery of the tax paid. Upon appeal by appellant, the Appellate Division, First Department, unanimously affirmed the judgment and upon further appeal the New York Court of Appeals unanimously affirmed.

The Appellate Division wrote no opinion. The trial court and the Court of Appeals both wrote opinions and both held the case to be controlled by *Canton Railroad Co.* v. *Rogan*, 340 U. S. 511 (1951), and *Western Maryland Railway Co.* v. *Rogan*, 340 U. S. 520 (1951).

Facts

(1)

Appellant is a New York corporation, with its sole place of business at 17 State Street in the Borough of Manhattan, City of New York (fol. 97). It is engaged in three kinds of business, all connected with foreign commerce: foreign freight forwarding; foreign freight brokerage; and customhouse brokerage (fols. 99, 270-272).

Foreign freight forwarding consists of furnishing services to domestic shippers and foreign purchasers in connection with exports of goods from this country (fols. 220-221; 225, 228, 232-233, 242).

Foreign freight brokerage is the solicitation of cargo and performance of related services for ocean carriers (steamship companies) (fols. 226-228, 242).

Customhouse brokerage consists of services performed for importers in connection with imports of goods into this country. *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 203-204 (1944).

The present case involves the tax only on appellant's receipts as a foreign freight forwarder (fols. 269-270). The City Comptroller has ruled that appellant's receipts as a foreign freight broker are not taxable (fols. 270-271; Pltff's. Exh. 2). Appellant has paid the tax on its receipts as a customhouse broker, and does not contest the tax on those receipts (fols. 244-246, 272).

For the calendar year 1956 appellant filed a return and paid tax on the following receipts (fols. 111-116; Defts.' Exhs. A, B and Q):

Types of Receipts	*Amount*	*Tax (¼ of 1%)*
Foreign freight forwarding	$244,059.81	$ 610.15
Foreign freight brokerage	194,738.10	486.85
Customhouse brokerage	11,935.12	29.83
Total	$450,733.03	$1,126.83

The City has refunded the $486.85 of tax paid on the foreign freight brokerage receipts. Appellant has waived refund of the $29.83 of tax paid on the customhouse brokerage receipts, leaving in issue, for 1956, the $610.15 of tax paid on the foreign freight forwarding receipts.

(2)

Appellant has six officers and sixty employees, all located at 17 State Street, New York City, which is a general office building in which appellant occupies two-thirds of a

floor (fols. 99, 104-105). Appellant has no warehouses or facilities for handling cargo, the premises being devoted solely to office activities (fols. 104-105).

As a freight forwarder appellant acts as the representative of the shipper (and occasionally of the foreign purchaser) in connection with the exportation of goods from this country (fols. 117-119, 228).

The services furnished by appellant with respect to a given export shipment are performed by one of its employees at the office in New York City. A single employee handles all aspects of a particular transaction or shipment from beginning to end (fols. 246-249).

The services involve communications, by telephone or messenger, with offices of carriers, consuls, insurance companies, the United States Customs and banks—all in New York City—and by telephone, telegraph, cable or mail, with the offices of shippers and consignees outside of the City (fols. 129-130, 143-146, 157-158, 164-166, 179-184, 300-303, 316-317, 380). All of appellant's business is physically transacted within the City (fol. 467).

(3)

In its capacity as a freight forwarder, appellant is not itself the shipper or exporter and has no beneficial interest in the goods being exported (fols. 159-160, 364-366, 443, 597). It is not a common carrier (fol. 380). It does not take physical possession of the exported goods at any time, or assume any liability for their loss or damage (fols. 259-260, 362, 420-423, 573).

Appellant is not in any way affiliated with the shippers or consignees it represents as a foreign freight forwarder; it operates as an independent contractor (fols. 381-382). The shipper does not supervise its activities (fols. 432-433). Its president testified that "The shipper advises us as to the end results he wishes to accomplish. The methods are ours." (fols. 433-434).

(4)

Usually appellant acts both as a foreign freight forwarder (on behalf of the shipper) and as a freight broker (on behalf of the ocean carrier) on the same shipment, although not always (fols. 240-242). In a case where the shipper charters a ship for the cargo, a forwarder would only do the forwarding work (fol. 242).

In acting for the steamship company as a freight broker, appellant is paid by the steamship company a brokerage commission, consisting of a percentage of the freight charge, usually amounting to 1¼% of the ocean freight; and, in special circumstances, amounting to 2½% of the freight (fols. 227, 229).

On the other hand, in acting for the shipper as a foreign freight forwarder, appellant is paid by the shipper a fee of between $10 and $20 per shipment (fols. 424-425). This fee is not based on the freight charge or on the value of the merchandise shipped, but on the time consumed by appellant in doing the work (fols. 141-142, 230, 610-611).

In its capacity as a foreign freight forwarder, appellant also makes separate charges for local accessorial services, such as furnishing consular blanks, coopering, local truck-

ing and warehousing and arranging for marine insurance (fols. 119, 123-129; Defts.' Exh. B). During 1956 these accessorial charges totalled $41,175.39 or 17% of its freight forwarding receipts.

(5)

Appellant's president testified that the forwarding fee it charged the shipper covered services rendered in (a) expediting the movement of the cargo to New York, (b) the preparation of export documents, and (c) the delivery of documents to the bank (fols. 232-233). A fourth activity, performed in connection with the movement of the goods to the ship after their arrival in port, was described by him as a coordinating service and was listed by him among both the brokerage and the forwarding services (fols. 226, 232-233).

The details of the services performed by appellant under each of these four heads are as follows:

(a) *Expediting.* This consists of tracing the movement of the goods in the possession of the railroad (after the shipper has delivered them to the railroad) to make sure the goods arrive in port on time (fols. 151-152). It is done through an employee of appellant at its office in New York City by telephone or personal calls to the railroad company's office in New York City (fols. 234, 380). Appellant never sends anyone out "on a railroad line, or anything like that" (fol. 234).

Appellant does not physically move the goods; normally it does not even see the goods; it does this work by simply

keeping in close touch with the railroad's New York City office (fols. 260-262, 378-380). The goods are in the physical custody of the carrier, not of appellant, at all times (fols. 420-421).

(b) *Preparation of documents.* The documents prepared by appellant in its capacity as a forwarder are (i) the export declaration, (ii) certificate of origin, (iii) consular invoice, (iv) insurance certificate, and (v) letter of transmittal (Defts.' Exhs. F, p. 217; G, p. 219; I, p. 223; J, p. 225; K, p. 227).

(i) The export declaration (Defts.' Exh. F, p. 217) is prepared by appellant in quadruplicate; taken by one of its messengers to the Customs House for approval and signature by the Customs authorities and a copy is furnished to the steamship company's office, as this "allows them to load the cargo" (fol. 157-158, 326-327). Appellant signs the declaration as agent of the exporter (fols. 159, 324).

(ii) The certificate of origin (Defts.' Exh. G, p. 219) is used only in connection with exports to certain countries (fol. 329). It states that the goods are of American origin; is signed by appellant as agent of the shipper; and contains a certification by the Commerce and Industry Association that it has examined the invoice and finds that the products originated in the United States. It is part of appellant's job as a forwarder to have the Commerce and Industry Association, at its office in New York City, execute the certificate (fols. 328-329).

(iii) The consular invoice (Defts.' Exh. I, p. 223) contains the same information as the commercial invoice, but

is in the language of the country of destination, and after preparing it appellant has it visaed by the consulate in New York City of that country (fols. 130-131, 338-340).

(iv) The insurance certificate (Defts.' Exh. J, p. 225) insures the shipper or consignee, as their interest may be, against loss of the goods (fols. 340-343). Appellant is neither the insurer nor the insured; it acts on behalf of the shipper in obtaining the coverage; and receives a portion of the premium for rendering the services (fols. 176-179, 212-213, 342). In arranging for this insurance appellant acts as an insurance broker (fols. 485-487).

(v) The letter of transmittal (Defts.' Exh. K, p. 227) is a covering letter used by appellant in delivering copies of the documents to the bank (fols. 343-344).

(c) *Delivery of documents to the bank.* When the ocean carrier has signed the ocean bill of lading, and the various documents have been prepared, "the actual exporting of the goods has been accomplished" (fol. 185). At this point the appellant assembles the documents and presents them to a bank in New York City, which then makes payment to the shipper under the letter of credit (fols. 181, 345-348). Appellant submits the papers to the bank after the carrier has loaded the goods on the ship, such loading being the responsibility of the carrier and not of appellant (fols. 189-191; 370-372).

Normally, appellant delivers seven documents to the bank, consisting of the aforesaid five documents prepared by it as a forwarder, plus a sight draft and the steamship bill of lading (fols. 213-220).

d. *Coordinating.* The coordinating services were performed by appellant after the goods arrived in New York and consisted of arranging a mutually satisfactory time for the railroad to deliver the goods to the steamship or pier (fols. 361-364). The railroad was required, under its contract with the shipper, to deliver the goods to the steamship company, and appellant never sent people to the pier or to accompany the lighter (fols. 362, 378-380).

POINT I

Since appellant's services as a foreign freight forwarder are performed within the City of New York and are local in nature, the Commerce Clause does not bar the tax on its receipts from such services.

(1)

The jurisdictional statement, in stating the questions presented (p. 4), describes appellant's foreign freight forwarder services as the "arranging for the movement of export cargo" and "forwarding of cargo." The identical description of its activities in appellant's Court of Appeals brief led that Court properly to term it a "little overstatement" since the appellant (Juris. Statement, App. A, p. 22):

> "never handles these goods at all * * * but performs for the shipper at New York City incidental services * * *. Appellant, of course, is not itself a shipper or exporter or common carrier, has no ownership of or other interest in the goods and never has actual or constructive possession of the goods or responsibility for them."

The Court accurately summarized appellant's forwarding functions as consisting of "tracing" the shipment from inland to seaboard (consisting of obtaining information from the railroad as to where the goods were from time to time); preparing a number of documents and getting them signed and filed with the Customs House or banks; and obtaining insurance for the shipper (*id.*, at p. 24). From this it concluded that the tax was valid because imposed on receipts from local services "not including any actual transportation services or any responsibility for such service" (*id.*, at p. 25).

(2)

The tax in the present case, so far as the Commerce Clause issue is concerned, is sustained by *Canton Railroad Co.* v. *Rogan*, 340 U. S. 511 (1951), where a Maryland franchise tax, measured by gross receipts, was held to be valid under the Commerce Clause as applied to the receipts of a railroad company located in Baltimore. The receipts taxed arose from the furnishing of switching, wharfage, storage and weighing services, and the supplying of a crane at the pier, in connection with the movement of goods into and out of the country through the Port of Baltimore.

The tax was upheld on the ground that "a nondiscriminatory gross receipts tax on an interstate enterprise may be sustained if fairly apportioned to the business done within the taxing state" (p. 515). Although the tax was on 100% of the railroad company's receipts, it was upheld since all of the railroad's activities were in the taxing state.

The present appellant, like the Canton Railroad, furnishes services connected with the transportation of goods in foreign commerce, and its activities are similarly carried on entirely within the taxing jurisdicton. The *Canton* case would seem to be controlling here.

The appellant's contention that the *Canton* case did not pass on the Commerce Clause question is refuted by the express reference in the opinion in that case to the railroad's objection "on the ground that interstate commerce is involved" (p. 515), and the railroad's argument of the point both in its main brief (POINT IV, pp. 54-57), and in its reply brief (pp. 1-4).

(3)

In *United States* v. *American Union Transport, Inc.*, 327 U. S. 437 (1946), this Court described the foreign freight forwarder as an agent of the shipper, acting as a "go-between" with the carrier, having no part in the transportation service proper and no responsibility for the transportation of the goods (pp. 443, 444, 448, 450, 456).

Analogous services, though connected with, and even essential to, interstate commerce have been held to be not part of the actual interstate transportation service and to constitute a local business subject to taxation by the state: *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90, 94-95 (1937); *Federal Compress Co.* v. *McLean*, 291 U. S. 17 (1934); *Pennsylvania R. R. Co.* v. *Knight*, 192 U. S. 21 (1904); *Nathan* v. *Louisiana*, 8 Howard (49 U. S.) 73 (1850); *Matter of Pekao Trading Corp.* v. *Bragalini*, 9 AD 2d 359 (3rd Dept., 1959), aff'd 8 NY 2d 903 (1960), app. dis. 364 U. S. 478 (1960); *Alaska* v. *Arctic Maid*, — U. S. —, decided May 1, 1961.

The fact that appellant's business is regulated under the Shipping Act does not bar the tax, since local activities clearly subject to state taxation may, nevertheless, be subject to federal regulation where the purpose to be accomplished by the federal regulation requires it. *State of California* v. *United States*, 46 F. S. 474, 477 (D. C. Calif., 1942), aff'd 326 U. S. 577 (1944); *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 22-23 (1934); *Braniff Airways* v. *Nebraska State Board*, 347 U. S. 590, 594-597 (1954); *United States* v. *Darby*, 312 U. S. 100, 118-123 (1941).

(4)

In *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90, 94 (1937), it was held that activities of the taxpayer in that case in supplying longshoremen to shipowners "without directing or controlling the work of loading or unloading" were not interstate or foreign commerce but a local business subject to taxation by the state. The forwarding services supplied by the appellant in the present case similarly constitute a local business.

Its so-called "expediting" and "coordinating" services consisted of making telephone calls to the carriers' offices in New York City. The documentary services consisted of preparing export documents, delivering them to various offices in the City and mailing copies to the exporter and foreign importer. The accessorial services, for which appellant made a separate charge, consisted of the sale of consular blanks, arranging for coopering, for local trucking and for warehousing of the goods after their arrival in the City, and acting as an insurance broker.

All of these services were performed in the City of New York, and in performing them appellant at no time directed or controlled the transportation of the goods. It never itself took physical possession of the goods or assumed any liability for their loss or damage. Thus it was not itself engaged in interstate or foreign commerce, any more than the concern was that supplied stevedores to shipowners in the *Puget Sound* case.

Similar services furnished by customhouse brokers (with respect to imports) have been held subject to state taxation in Louisiana [*State* v. *Wm. J. Oberle, Inc.*, 190 La. 1053, 183 So. 347 (1938)] and subject to state regulation in Minnesota [*Union Brokerage Co.* v. *Jensen*, 215 Minn. 207, 9 N. W. 2d 721 (1943), aff'd 322 U. S. 202 (1944)].

(5)

Texas Transport & Terminal Co., Inc. v. *City of New Orleans*, 264 U. S. 150 (1924), on which appellant principally relies, involved a local tax on steamship agencies. The tax was held invalid under the Commerce Clause as applied to compensation received by a steamship agent from a number of steamship lines which it represented in the port.

The record in that case showed that the Texas Transport company operated as the steamship companies' office in the port. It not only solicited cargo, but it directed and controlled the entire process of ocean carriage. It selected the ships to be used, signed for delivery of the cargo on the wharfs, supplied and equipped the ships, engaged and supervised the stevedores in loading and discharging cargo,

issued bills of lading, collected the freight charges and paid ships' disbursements. The present appellant, in performing its services as a forwarder, admittedly furnished none of these services (fols. 384-397).

This Court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90 (1937), in sustaining the tax on the business of supplying stevedores to shipowners, distinguished the *Texas Transport* case, stating that there was "little analogy" between the activities of furnishing stevedores and those of agents acting for steamship companies and entering into binding contracts for them.

(6)

The appellant's rather incredible contention that its activities as a freight forwarder are the same as its activities as a freight broker (Juris. Statement, p. 10) is completely refuted by the evidence that the two activities are separate, distinct and different (*Cf.* fols. 226-227 and 232-233; fol. 242).

That the activities taxed herein were not the same as those furnished by appellant to the ocean carriers is clear from *United States v. American Union Transport, Inc.*, 327 U. S. 437 (1946), which emphasized that foreign freight forwarders *do not render any services to the carriers at all* (*Id.*, at pp. 443, 448, 458, 462). See, also, *American Union Transport v. United States* 257 F. 2d 607 (D. C. Circ., 1958), cert. den. 358 U. S. 828 (1958), where the difference in function between foreign freight forwarders and foreign freight brokers is delineated.

POINT II

The Import-Export Clause does not bar the tax since appellant's services as a foreign freight forwarder are performed in connection with bringing the exported goods to the water's edge, and are not part of the export process.

(1)

In *Canton Railroad Co.* v. *Rogan*, 340 U. S. 511 (1951) this Court made a clear distinction between *goods* in import or export and the *handling of the goods* at the port, holding that an articl may itself be an import or export and be immune from tax before and after it reaches the port, but that, when the tax is on activities "connected with the export or import," the acts constituting the export or import process "begin and end at water's edge," concluding (p. 515):

> "that any activity more remote than that does not commence the movement of the commodities abroad nor end their arrival and therefore is not a part of the export or import process."

It held that, for state tax purposes, "the handling of the goods at the port" was not "part of the export process," so long as it did not involve loading and unloading of the ship, (*id.*).

In *Western Maryland Railway Co.* v. *Rogan*, 340 U. S. 520 (1951), decided at the same time, this Court repeated the rule, stating that (p. 522):

> "So far as taxes on activities connected with bringing exports to or imports from the ship are concerned, we think the line must be drawn at the water's edge."

(2)

All of the present appellant's forwarding services are performed in connection with bringing exports to the port and to the water's edge. They are included in what this Court in the *Western Maryland* case called the "manifold services * * * involved in the movement of exports * * * within the country" (340 U. S. at p. 522).

The trial court found that appellant's activities as a forwarder ended at the water's edge in New York City (fol. 713), and the Court of Appeals approved this finding (Juris. Statement, App. A, pp. 24-25). The finding is supported by testimony that appellant has no responsibility for the loading of the goods from the pier to the ship, never engages stevedores, and never even sends people to the pier (fols. 370-373, 380).

It is true that appellant does not submit the papers to the bank for payment under the letter of credit until the goods are on board the ocean carrier. But this does not make its services part of the loading process. Appellant simply waits until the carrier has completed this phase of the carrier's responsibility, as the Court of Appeals noted (Juris. Statement, App. A, p. 25).

(3)

The tax on appellant's forwarding services is not in any way comparable to taxes on bills of lading, charter parties or marine insurance policies, such as were held invalid as taxes on exports in *Fairbank* v. *United States*, 181 U. S. 283 (1901), *United States* v. *Hvoslef*, 237 U. S. 1 (1915) and *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U. S. 19 (1915).

Appellant issues no bills of lading and makes no charter party contracts. With regard to marine insurance the appellant concedes that it does not act even as an insurance broker, but merely, on behalf of the shipper, "arranges for such insurance through an insurance broker" (Juris. Statement, p. 5, fn. 1).

CONCLUSION

The appeal to this Court from the judgment of the Court of Appeals of the State of New York should be dismissed.

May 5, 1961

Respectfully submitted,

LEO A. LARKIN,
STANLEY BUCHSBAUM,
Counsel for Appellees.

MORRIS L. HEATH,
of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1960

No. 902

MOHEGAN INTERNATIONAL CORPORATION,
Appellant,

against

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, Comptroller of the City of New York, HILDA G. SCHWARTZ, Treasurer of the City of New York, and JOSEPH E. KEEGAN, Collector of the City of New York,

Appellees.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

GERALD H. ULLMAN,
Attorney for Appellant,
Office & P. O. Address,
120 Broadway,
New York 5, N. Y.

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Appellees.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

Preliminary Statement

By motion, dated May 5, 1961, appellees have moved to dismiss the within appeal on the ground that it does not present a substantial federal question. In this brief appellant will reply to the points and sub-points urged by appellees in the order contained in the motion to dismiss.

APPELLANT'S REPLY TO POINT I OF MOTION TO DISMISS

In this point heading appellees contend that the Commerce Clause does not bar the tax on appellant's receipts as a foreign freight forwarder since it services "are performed within the City of New York and are local in nature" (Motion, p. 10).

That the appellant's services are not "local in nature" has been dealt with under Point I of the Statement as to Jurisdiction to which the Court is respectfully referred. Appellees' other contention that the tax is not barred because the services are performed within the City of New York is novel and wholly contrary to the decided cases.

There are many services in transportation performed entirely within a port area which have been held to be in interstate and foreign commerce and thereby exempt from a local privilege tax. These services include those of a passenger agent for a railroad (*McCall* v. *California*, 136 U. S. 104 (1890)); a steamship agent for an ocean carrier (*Texas Transport and Terminal Co., Inc.* v. *City of New Orleans*, 264 U. S. 150 (1924); *Gdynia America Line, Inc.* v. *Taylor*, 250 App. Div. 105, 293 N. Y. S. 613 (1937)); stevedoring (*Joseph* v. *Carter & Weeks Company*, 330 U. S. 422 (1947)); marine terminal operations (*Port of Port Angeles, et al.* v. *Henneford, et al.*, 193 Wash. 29, 74 P. (2d) 1025 (1938)); and river piloting (*Seeth* v. *Joseph*, 276 App. Div. 188, 93 N. Y. S. 2d 591 (1949)). In addition, appellees have acknowledged that domestic forwarders are exempt from the city tax (Pl.'s Ex. 2, R. 206), even though their consolidation activities take place within the City of New York. Further, appellees have conceded that the gross revenue of appellant from carriers as a freight broker is exempt, even though all of its services are performed locally and indeed by the same personnel performing the forwarding services (R. 82-83, fols. 246-249).

Reply to Sub-Point (1)

Appellees note (p. 10) that appellant has described its ocean freight forwarding services as the "arranging for the movement of export cargo" and "forwarding of cargo" and then point out that the Court of Appeals "properly" termed this description "a little overstatement" (see Juris. St., App. A, p. 22).

It is difficult to understand why appellees object to this description when it is substantially no different than their statement on page 17 of their motion that "All of the present appellant's *forwarding services* are performed in connection with bringing exports to the port and to the water's edge." It is strange too that the Court of Appeals should take exception to the description "forwarding of cargo" when appellant has been held to be "carrying on *the business of forwarding* * * * in connection with a common carrier by water" under the U. S. Shipping Act, 1916, as amended (46 U. S. C. § 801, *et seq.*), *U. S.* v. *American Union Transport, Inc., et al.*, 327 U. S. 437 (1946). In that case this Court stated:

> "There is little or no dispute as to the nature of their business. They are primarily *forwarders of freight*, as that term is generally understood, for trans-shipment in foreign commerce." (*Id.* at p. 442, emphasis supplied)

The exception to appellant's description appears to be based upon an unwillingness by both appellees and the Court below to recognize that the "forwarding of cargo" is a distinct function and just as important to the transportation as the consolidation, carriage or loading of the freight.

Reply to Sub-Point (2)

Under this sub-point appellees insist that this Court sustained the tax in the *Canton Railroad* case under the Commerce Clause and they note that in the opinion therein reference was made to the railroad's objection "on the ground that interstate commerce is involved" and that the railroad argued the Commerce Clause in its main and reply brief (Motion, p. 12).

Obviously, a belated argument by the railroad of the Commerce Clause in its brief before this Court does not mean that its decision was based thereon. As noted in the

Statement as to Jurisdiction (p. 13), this Court in that case and in the *Western Maryland* case made no reference to the Commerce Clause and specifically limited the issue of taxability to the Import-Export Clause (340 U. S. at pp. 512 and 520). Both the majority and minority opinions in the Court of Appeals of Maryland likewise made it clear that the only issue raised was the validity of the tax under the Import-Export Clause. 195 Md. 206, 73 A. 2d 12 (1950).

Reply to Sub-Points (3) and (4)

Appellees cite several cases (p. 12) to the effect that "analogous services" to those of appellant, even though essential to interstate commerce, have been held to be a local business subject to state taxation. None of the services in the cases cited are even remotely analogous to those rendered by appellant as a forwarder. In the *Puget Sound* case the service was that of supplying longshoremen to be hired and controlled by ocean carriers. The taxpayer in effect was acting as an employment agency for longshoremen. Appellant does not supply personnel for forwarding work to be hired by either the shipper or carrier; on the contrary, it does the work itself with its own employees. In the *Federal Compress* case the activity involved was the storing and compressing of cotton, certainly far removed from the services in the within case. The *Pennsylvania R. R. Co.* case involved the operation of a local taxicab service and *Nathan* v. *Louisiana* concerned a money broker, neither of which two activities can be considered analogous to export forwarding. The *Pekao Trading Corp.* case involved the business of soliciting orders for gift parcels, assuredly not similar to appellant's functions.

Alaska v. *Arctic Maid*, — U. S. —, decided by this Court on May 1, 1961, dealt with a tax on the prosecuting of the business of freezer ships or other floating cold storages. The Court held that the process of gathering

fish by the respondents therein, either through their own catcher boats or through independent operators, was the taxable event and a "local activity" so different than the taxes sustained by this Court for the taking of shrimp or the extraction of ore. The forwarding of export traffic across state lines into our foreign commerce is far removed from catching or buying of salmon in Alaskan waters.

Appellant argued (Juris. St., pp. 10-11) that the close regulation of its activities by the Federal Maritime Board under the U. S. Shipping Act, 1916, and the Merchant Marine Act of 1936 establishes that it is engaged in interstate and foreign commerce. In answer thereto appellees cite cases (p. 13) to the effect that a business can be subject to federal regulation and still be considered a "local activity" subject to state taxation. With one exception none of the cases cited deal with a local privilege tax. In any event, appellees misconstrue appellant's contention. It is not contended that the subjection of an activity to any type of federal regulation, no matter how minimal, *ipso facto* places that activity in interstate and foreign commerce. But the detailed and direct regulation of forwarders under federal shipping laws, being no different than the governmental control exercised over steamship lines and other transportation industries held exempt from the tax, establishes conclusively that the business must be in interstate and foreign commerce.

On page 14 and elsewhere (pp. 5, 11) appellees contend that appellant is not engaged in interstate and foreign commerce because it does not direct or control the transportation of the goods, take physical possession of them or assume any liability for loss or damage. These factors weighed with the court below in holding that appellant's forwarding activities were "a local business and are separate from such commerce" (Juris. St., App. A, pp. 22, 25).

The fact that appellant does not physically handle the goods or assume liability for transportation is completely

irrelevant to the issue as to whether it is engaged in interstate and foreign commerce. Appellees have conceded that the revenue of appellant as a freight broker is not taxable, stating that such activities are "an integral part of foreign commerce" (Pl.'s Ex. 2, fols. 270-271). Yet, as a broker appellant does not transport the goods or assume responsibility therefor. Neither does a passenger agent or a steamship agent, this being the obligation of their carrier principals. *E. I. duPont De Nemours & Co.* v. *Barge Carriers, Inc. et al.*, 55 F. Supp. 728 (1944). In the *McCall* and *Texas Transport* cases, *supra*, this Court held these agents exempt from a local privilege tax.

The two cases relating to customhouse brokers, cited by appellees on page 14, are inapposite. The services rendered by customhouse brokers on imports are not similar to those of forwarders on exports. This may be seen from a description of the work of the former contained in *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 203-204 (1944). Customhouse brokers have no relationship with ocean carriers; they are not involved in the process of coordinating the movement of goods inbound to the port area nor must they see to it, as does the forwarder, that the cargo arrives at shipside at precisely the desired time with proper documents and is loaded per schedule. The customhouse broker performs the clerical function of clearing the goods through the local customhouse and is not concerned with the movement of the cargo. Furthermore, it was emphasized by this Court that the tax sustained in the *Union Brokerage* case was, unlike the within tax, "a supervisory and not a fiscal measure" (*Id.* at p. 210).

Reply to Sub-Point (5)

In an effort to distinguish the *Texas Transport* case, *supra*, appellees note (pp. 14-15) that certain activities of the steamship agent therein are not the same as those of appellant as a forwarder. It is true that the services

are not identical, since the steamship agent is acting on behalf of a carrier and the forwarder on behalf of an exporter at the port. However, by cooperating with each other on behalf of their respective principals the steamship agent and the forwarder accomplish the exportation of the goods. The record shows that the forwarder "works hand in glove with the steamship agent" on the movement (R. 175, fol. 525). Both the carrier and its port agent as well as the exporter are exempt from a local privilege tax. Can it logically be said that the exporter's port agent, the forwarder, is any less deserving of the constitutional protection than these others?

On page 15 appellees cite the fact that the steamship agent is empowered to enter into binding contracts for a steamship company as relevant to the issue of the exemption received from the tax. Appellant as a forwarder makes binding contracts for its principal, the exporter. It makes a booking contract with the steamer, negotiates and accepts the bill of lading (the contract of carriage) and makes other contracts for the exporter with marine insurance underwriters, warehousemen and motor carriers. Appellant's power to contract for the exporter is basically no different than that of the steamship agent for the carrier.

Appellees describe as "incredible" (p. 15) appellant's contention that its services as a forwarder are the same as those of a freight broker. The uncontroverted testimony is that "In many cases, payment is for the same service. In other words, the services are of value to both the shipper and the steamship line, and payment is made by both parties for overlapping services" and that "it is difficult to draw any sharp line of distinction" when appellant is acting as a forwarder as distinguished from a broker (R. 77, fol. 231; R. 188, fol. 564). The Trial Court likewise found that services rendered to the carriers are also rendered to the exporters (R. 241, fol. 723; 17 Misc. 2d 104, 111).

The evidence herein is that the principal service rendered to the steamship line by appellant as a freight broker is getting the revenue-producing freight from the inland supply point on to the ship (R. 77, fol. 231). This is also the primary service rendered to the shipper as a forwarder (R. 78, fol. 233). In their motion appellees acknowledge the fact that "A single employee handles all aspects of a particular transaction or shipment from beginning to end" (p. 5). When this employee coordinates the movement of the cargo from supply point to shipside, the remuneration to appellant from the carrier for this service as a broker is, according to the city, exempt from the tax, but its revenue from the exporter as a forwarder for the identical service by the same employee is held subject to the tax. Such a patently incongruous conclusion, which is the effect of the decision below, cannot reasonably be sustained and merits review by this Court.

APPELLANT'S REPLY TO POINT II OF MOTION TO DISMISS

Reply to Sub-Points (1) and (2)

Appellees cite the *Canton Railroad* and *Western Maryland Railway* cases in support of the proposition that the appellant's activities as a forwarder are not immune from the city levy under the Import-Export Clause (p. 16). They assert that these cases held that the "handling of the goods" at the port prior to the water's edge is not part of the export process and that appellant's activities, therefore, in "bringing exports to the port and to the water's edge" are taxable (p. 17).

Assuming these cases are sound law,[1] appellees have not met appellant's contention that there is a clear dis-

[1] Justices Frankfurter and Jackson reserved decision after expressing "grave and what appear to be soundly based doubts" concerning these decisions. See Brown, Justice Frankfurter—The Open Economy, 67 Yale L. J. 219, 232-233.

function between the handling of goods at the port by the railroads, a purely local physical function, and appellant's services in coordinating the movement across state lines from supply point to shipside, a non-physical activity extending beyond the port area. Unless these services are judicially recognized as part of the export process, the Import-Export Clause would be rendered meaningless. "To be effective, this clause must be construed broadly enough to prevent a state from avoiding the prohibition by placing the tax burden on an indispensable activity connected with the [export]." 50 Mich. Law Review 152, 153 (1951). By taxing the indispensable function of forwarding, the city is placing a serious obstruction in the path of the federal policy against restraints upon exports.

Appellees' assertion that the forwarder's services end at the water's edge and that thereafter it "simply waits" (p. 17) for the carrier to load the goods is contrary to the undisputed evidence in the record. Appellant owes a legal duty to its shipper to make certain that the goods are actually on board the vessel (Juris. St., pp. 18-19), an activity extending beyond the water's edge.

Appellees assert under sub-point (3) that a tax on appellant's forwarding services is not in any way comparable to the taxes held invalid by this Court on bills of lading, charter parties, or marine insurance policies since appellant does not issue such documents (pp. 17-18). The test as to validity is not determined by who issues the document. The aforementioned taxes were invalidated under the Import-Export Clause because they added to the exporter's price of the goods or otherwise directly burdened the exportation. *Brown* v. *Maryland*, 12 Wheat. 419, 444 (1827); *Fairbanks* v. *U. S.*, 181 U. S. 283, 293 (1901). A tax on goods destined for export which must be absorbed in the price is a burden to the exportation, regardless of whether it is levied upon a document or service necessary to the export process. Such a tax is invalid because it

must eventually be paid by the exporter or consignee as part of the transportation cost. The gross receipts tax herein falls squarely into this category since it lays a burden on every transaction. (See *Crew Levick* v. *Penn.*, 340 U. S. 292, 297 (1917).)

Conclusion

The record herein indicates that this is a test case brought on behalf of the ocean freight forwarding industry in the City of New York. Several hundred forwarders await the answer to the question as to whether the City should be allowed to exploit its geographic position as the major American port to levy a toll on the great bulk of exports passing through its gates. Such an issue is federal and substantial and merits plenary consideration by this Court.

The motion to dismiss the appeal should, therefore, be denied.

Respectfully submitted,

GERALD H. ULLMAN,
Attorney for Appellant,
Office & P. O. Address,
120 Broadway,
New York 5, N. Y.

May , 1961.